IN THE

# Supreme Court of the United States

**October Term, 1957.**

**No. 34.**

**WILLIAM J. KERNAN, Administrator of the Estate of Arthur E. Milan, Deceased, and JOHN J. MEEHAN, Administrator of the Estate of Donald H. Worrell, Deceased,**

*Petitioners,*

*v.*

**AMERICAN DREDGING COMPANY, as Owner of the Tug "Arthur N. Herron," In the Matter of the Petition for Exoneration From or Limitation of Liability,**

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.**

# BRIEF FOR THE PETITIONERS.

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## MISCELLANEOUS.

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## BRIEF FOR THE PETITIONERS.

### OPINIONS BELOW.

The opinion of the District Court for the Eastern District of Pennsylvania is reported at 141 F. Supp. 582 (R. 424). The opinion of the Court of Appeals is reported in 235 F. 2d 618 (R. 425-427). The opinion of the Court of Appeals on the petition for rehearing is reported in 235 F. 2d 619 (R. 429).

### JURISDICTION.

The judgment of the Court of Appeals was entered on July 5, 1956 (R. 428). The order denying rehearing was entered on August 13, 1956 (R. 429). The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1).

## QUESTIONS PRESENTED.

1. In an action based on the warranty of seaworthiness, is it necessary to show fault or knowledge of a dangerous or unsafe condition on the part of the shipowner before liability can be imposed; or does liability attach under the warranty because the vessel or its equipment is *in fact* unsafe under the circumstances?

2. Where the breach of a regulation is the proximate cause of an injury, can the shipowner escape responsibility because the injury was not contemplated by the regulation?

## REGULATION INVOLVED.

Coast Guard Regulation Title 33, Chap. 1, Subchap. D, part 80.16(h), as reported in the Federal Register, provided as of the dates involved in these cases:

> "80.16 Lights for Barges, Canal Boats, Scows, and Other Nondescript Vessels on Certain Inland Waters on the Atlantic and Pacific Coasts.—
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> * * *
>
> "(h) Scows not otherwise provided for in this section on waters described in paragraph (a) of this section shall carry a white light at each end of each scow, except that when such scows are massed in tiers, two or more abreast, each of the outside scows shall carry a white light on its outer bow, and the outside scows in the last tier shall each carry, in addition, a white light on the outer part of the stern. The white light shall be carried not less than 8 feet above the surface of the water, and shall be so placed as to show an unbroken light all around the horizon, and shall be of such a character as to be visible on a dark night with a clear atmosphere at a distance of at least 5 miles."

## STATEMENT OF THE CASE.

Two seamen were killed in a marine disaster in the Schuylkill River in Philadelphia on November 18, 1952. Respondent, the owner of the vessels involved, filed a petition in admiralty for exoneration from or limitation of liability in connection with that disaster. These proceedings arose out of that limitation proceedings.

The Schuylkill River is a navigable waterway which empties into the Delaware River within the Port of Philadelphia. Along the banks of the river, within the Philadelphia Area, there are several oil refineries, including the Atlantic Refining Co., the Gulf Co., and the Esso Refinery, where ocean-going tankers load and discharge inflammable petroleum.

The respondent dredging company was engaged in deepening the Schuylkill River at the dock of the Atlantic Refining Company near Point Breeze within the City of Philadelphia. As the mud was dredged from the bottom of the river, it was deposited in scows and towed several miles down the river by respondent's tugboat "Arthur N. Herron" to a dumping ground.

The tugboat was under the command of an unlicensed master, James M. Taylor, and his crew consisted of one engineer, Arthur E. Milan; one oiler, Paul Bugoski; two deckhands, Donald H. Worrell and Francis J. Harrington; and the cook, McGinley (R. 36).

On the day of the accident, November 18, 1952, there were seven ocean-going tankers moored to the spillways at the Gulf Refining Co. Plant, which lay between the Atlantic Plant and the dumping ground, loading or discharging liquid petroleum (R. 151). At the time of the accident, these vessels were displaying the required red electric lights as a warning signal to all traffic on the river (R. 157). At the approach to the Gulf Plant, there was a large sign "No Smoking—No Open Lights" (R. 175). On the dock side,

there were signs every fifty feet "prohibiting the use of naked lights and smoking" (R. 175).

On the night of the accident, the tug "Herron" picked up an empty scow at the dumping ground and towed it up the river to the Atlantic Dock where the dredging operation was taking place (R. 388). The *empty* scow had between four to five feet of freeboard from the deck to the water (R. 388). Its navigational lights consisted of two *open flame* kerosene lanterns placed on the deck, one on the bow and the other on the stern. After the empty scow was towed to the scene of the dredging operation, the tugboat then took on a loaded scow and transferred the open flame lanterns from the empty to the loaded scow. The loaded scow had *two feet less freeboard* than the empty one and the lanterns were no more than 2½ to 3 feet above the water (R. 117, 388).[1]

The tug proceeded down the river with her tow about 9:00 p.m. The tide was flood with a 4 to 5 mile per hour southeast wind. The temperature was about 46 degrees and the humidity was about 80% (R. 286-291). As the tug and the tow came abreast the Gulf Refining Plant, Captain Taylor signalled the deckhand, Worrell, to take the wheel and he went below for a cup of coffee, leaving the deckhand alone in charge of the bridge (R. 126), despite the fact that the tankers were displaying the red warning light indicating that they were loading or discharging inflammable liquid petroleum (R. 157). At that time the captain noticed a strong odor of gasoline in the air (R. 122-123). After drinking the cup of coffee the captain then went from the galley to chat with the engineer outside the engineroom door, and while so engaged he heard a rumbling on the port side of the tow (R. 127), and a ribbon of flame sprang up along the port side of the scow *near the kerosene lamps.*

1. Captain Taylor testified that the fumes coming from the refineries are heavier than air and, when they settle upon the water, the lower they are the greater the concentration and the more subject they are to inflammation (R. 119).

Within a matter of seconds, the water all around the tug and scow was ablaze (R. 194, 211-212). There was no fire between the scow and the tug (R. 221-222).

Captain Taylor stood transfixed on the deck for about *one minute* without taking any action (R. 132). He made no effort to put the fire fighting apparatus into operation because he was confused and he just didn't think (R. 136). He then entered the engineroom with the deckhand, Harrington, who was immediately behind him and he ordered all the hatches closed and the engines stopped (R. 128). He made no effort to reach McGinley, the cook, who was asleep in the cabin (R. 129-130), nor Worrell who was up on the bridge at the wheel.[2] Nor did he make any attempt to communicate with Worrell via telephone or speaking tube between the engine room and the bridge (R. 141). The engineer and the oiler were already in the engine room when Captain Taylor entered.

The captain's next order was to put the engines astern (R. 132). After about three minutes, he looked out of the porthole and saw the fire on the water dying down, so he again ordered the engines stopped (R. 380). When the engineer failed to respond to this order, he thought that the engineer had been overcome by smoke and had fallen to the deck (R. 133), so he reached over to the controls and stopped the engines himself (R. 133). Captain Taylor then called out to "abandon ship" (R. 133). Without further ado, the captain hastened out of the engine room, leaving the others behind him and without making any effort to look for the engineer whom he thought had been overcome by smoke (R. 133). Nor did he attempt to communicate with Worrell who was on the bridge to instruct him to abandon ship. When the captain came out of the engine room, the fire on the water had practically burned out except for occasional patches (R. 32). In a matter of seconds, the captain reached the stern where he found the cook and jumped over-

2. The Tug "Herron" was of all steel construction except for the wheelhouse which was wooden (N. T. 7).

board with him, leaving the others behind. When the oiler Bugoski and the deckhand Harrington came to the stern, the captain had already swum ashore to the Gulf dock and was calling to them from the dock to jump overboard (R. 200). The bodies of Worrell, the deckhand who had been on the bridge, and Milan, who the captain thought had been overcome by smoke, were never found and they are presumed to have perished in the disaster.

In the trial court, the petitioners contended that the vessel was unseaworthy because it was operating with open flame kerosene lanterns in a petroleum refinery area which was *in fact* unsafe under the circumstances; that it was also negligence to use the open flame lamps in a petroleum refinery area, particularly so low and close to the water where the inflammable concentrations of petroleum are known to lie; that the placing of the kerosene lamps on the deck of the vessel only 2½ to 3 feet above the water instead of 8 feet above as required by the Coast Guard regulation rendered respondent liable since this breach of the regulation was a proximate cause of the disaster; that the vessel was also unseaworthy because the captain was not equal in disposition and seamanship to the average man in the calling. The trial judge denied all of these contentions and completely exonerated respondent from any and all liability in connection with the disaster. In reaching these conclusions, the District Judge failed to make any distinction between negligence and unseaworthiness and expressly considered both of these theories of liability as though they were governed by the same criteria. The District Judge held that the vessel was not unseaworthy and that the respondent was not negligent because there was no evidence that the river was "considered a danger area so that it would be negligent for a ship to carry open flame lanterns at a height of three feet above the water." (R. 418) The District Judge held that the respondent violated the Coast Guard regulation and that this violation was the proximate cause of the disaster; but he denied liability in this connec-

tion because the injury "was of a kind not contemplated or intended to be guarded against by the regulation" (R. 418).

The decision of the District Judge was affirmed in a per curiam opinion, with Judges Maris and Kalodner holding that the fact findings "were not clearly erroneous" and the conclusions of law "were correct." Chief Judge Biggs dissented upon the ground that he did "not see how a plainer demonstration of unseaworthy appliances could be made." A petition for rehearing was filed which was denied without oral argument on the ground that Judges Maris and Kalodner "do not desire rehearing" and Judges Goodrich and Hastie "do not think it apropriate to order rehearing before the court en banc." However, Chief Judge Biggs and Judges McLaughlin and Staley dissented, holding that a hearing before the court en banc should have been ordered.

## ARGUMENT.

### I.

### Liability Under the Warranty of Seaworthiness Arises if in Fact the Vessel and Its Appurtenances Are Unsafe or Dangerous in Connection With the Contemplated Voyage and This Is So Irrespective of Whether or Not the Shipowner Was Aware of the Danger Involved.

The Trial Judge treated the issues of negligence and unseaworthiness as though they were dependent upon the same considerations, and he made no distinction whatever between them as applied to this case. He considered them together as though they were one and the same. His holding in this connection discloses (R. 418):

> "This brings us to the question whether, apart from any question of failure to observe a regulation, there was *common-law negligence* or *unseaworthiness* under the general maritime law. The lanterns carried were open flame kerosene lights of a proper and suitable type. It is true that the Schuylkill River has on its banks several refineries and facilities for oil storage and for loading and unloading petroleum products, but there is no evidence that the river at this point is, or ever has been, *considered* a danger area, so that it would be *negligent* for a ship to carry open flame lanterns at a height of three feet above the water, and I find that there *was no negligence* in doing so." (Emphasis supplied.)

Despite the fact that this finding would obviously appear to apply only to questions of negligence, nevertheless, the court below made no distinction between negligence and unseaworthiness and treated both as though they were gov-

erned by the rules of negligence. This holding of the Court is in direct conflict with the rulings of this Court regarding the warranty of seaworthiness.

This Court clearly enunciated the nature and scope of the warranty of seaworthiness in *Mahnich v. Southern S. S. Co.*, 321 U. S. 96. In that case, Mahnich, a seaman, was injured when the scaffold upon which he was working fell because one of the supporting ropes parted. The rope had been intended for use in the lyle gun box; however, a section of it had been cut at the direction of the mate from a coil which was examined and tested by the boatswain and the mate and found to be generally sound in appearance. After the accident, an examination of the rope at the point of the break showed that it was rotten and inadequate. The sole ground of liability alleged was a breach of the warranty of seaworthiness. The trial judge there, who also decided the case at bar, held that there was no breach of the warranty on the ground that there was an abundant supply of good rope on board and that the accident resulted from the negligence of the mate and the boatswain in selecting a defective section of rope under the circumstances. The Court of Appeals there, as here, affirmed with the Chief Judge dissenting. Upon certiorari, this Court reversed the majority in the *Mahnich* case and, in so doing, pointed out the error which the Court of Appeals below and other Courts had committed in confusing negligence with the warranty of seaworthiness. On this very point, the Supreme Court stated at page 100:

> "In a number of cases in the federal courts, decided before The Osceola, 189 U. S. 158, 47 L. ed. 760, 23 S. Ct. 483, supra, the right of the seaman to recover for injuries caused by unseaworthiness seems to have been rested on the negligent failure, usually by the seaman's officers or fellow seamen, to supply seaworthy appliances. The Noddleburn (DC) 12 Sawy. 129, 28 F. 855, affirmed in (CC) 12 Sawy. 327, 30 F. 142; The

Neptuno (DC), 30 F. 925; The Frank and Willie (DC) 45 F. 494; The Julia Fowler (DC) 49 F. 277; William Johnson & Co. v. Johansen (CCA 5th), 86 F. 886; and see The Columbia (DC) 124 F. 745; The Lyndhurst (DC) 149 F. 900. But later cases in this and other federal courts have followed the ruling of The Osceola, 189 U. S. 158, 47 L. ed. 760, 23 S. Ct. 483, supra, that the *exercise of due diligence does not relieve the owner of his obligation to the seaman to furnish adequate appliances.*" (Emphasis supplied.)

The Court then evaluated the facts in the *Mahnich* case on the basis of the warranty of seaworthiness, as distinguished from considerations of negligence, and pointed out, inter alia, that under the warranty liability attached even though the failure to observe the dangerous or defective condition was unavoidable. Said this Court at page 103:

"The staging from which petitioner fell was an appliance appurtenant to the ship. It was unseaworthy in the sense that it was inadequate for the purpose for which it was ordinarily used, because of the defective rope with which it was rigged. *Its inadequacy rendered it unseaworthy, whether the mate's failure to observe the defect was negligent or unavoidable.* Had it been adequate, petitioner would not have been injured and his injury was the proximate and immediate consequence of the unseaworthiness. See The Osceola, supra (189 U. S. 174, 175, 47 L. Ed. 764, 765, 23 S. Ct. 483) and cases cited." (Emphasis supplied.)

The Court then stated the rule which is so clearly applicable to the case at bar and concluded that the shipowner is under an absolute obligation to provide seaworthy appliances "*when and where the work is to be done*" (p. 103):

"We have often had occasion to emphasize the conditions of the seaman's employment, see Socony-

> Vacuum Oil Co. v. Smith, supra (305 U. S. 430, 431, 83 L. ed. 269, 270, 59 S. Ct. 262) and cases cited, which have been deemed to make him a ward of the admiralty and to place large responsibility for his safety on the owner. He is subject to the rigorous discipline of the sea, and all the conditions of his service constrain him to accept, without critical examination and without protest, working conditions and appliances as commanded by his superior officers. These conditions, which have generated the exacting requirement that the *vessel or the owner must provide the seaman with seaworthy appliances with which to do his work, likewise require that safe appliances be furnished when and where the work is to be done.*" (Emphasis supplied.)

This Court thus made it crystal-clear that the warranty of seaworthiness follows the seaman whenever and wherever the work is to be done. It is not defense for the shipowner to say that he did not know, or had no way of knowing that the vessel or its appliances were unsafe. If *in fact* the place of work or the appliances are unsafe then the warranty has been breached.

Liability under the warranty, as distinguished from negligence, is an insurer's obligation which arises immediately upon the happening of the occurrence without regard to cause. In *The Fred Smartley, Jr.*, 108 F. 2d 603 (CA 4), Chief Judge Parker, citing from an opinion by Judge Learned Hand, defined the warranty in these terms (p. 606):

> "'A warranty is a promise that a proposition of fact is true. Theoretically it is extremely difficult to interpret it otherwise than as a promise to make whole the warrantee, if the warranty turns out to be false, since a promise is normally a stipulation for some future conduct by the promisor. If it is so regarded, then clearly the breach of warranty is with the warrantor's

privity, for by hypothesis he has deliberately refused to make whole the warrantee. However, it must be conceded that the law regards the breach as arising at once if the warranty be false, and the warrantee's loss as damages, not as a condition for the warrantor's performance. So viewed, the warrantor has misled the warrantee by falsely assuring him of the truth through the warranty, and the wrong consists of the assurance, the warrantee's reliance upon it, and his loss; just as in cases of deceit, except that no scienter is necessary. And so the action on warranty was originally "a pure action of tort" (Ames, History of Assumpsit, 2 Harv. L. R. 1, 8), and arose a century before action on the case for assumpsit. The action sounded indeed in deceit (Y. B. 11 ed. IV, 6 plac. 11), and it was not until 1778 in Stuart v. Wilkins, 3 Doug. 118, that assumpsit appears to have been used on a seller's warranty.

" 'Regarded in this way, which is probably the correct way historically, it follows inevitably that a breach of warranty should be held to be with the warrantor's privity because all the elements of the cause of action are "done, occasioned, or incurred" by him personally; that is to say, he personally gives the false assurance, he intends the warrantee to rely upon it, and the loss arises from the misfaken reliance, as he knows it will. Thus he personally occasions the loss.' "

The holding of the court below that the warranty was not breached because the shipowner was unaware of the dangerous condition is thus clearly erroneous. The shipowner under the warranty represents that the vessel is safe and suitable for the contemplated voyage and if *in fact* this representation should prove to be false, as it did in this case, then the warranty is breached regardless of whether the shipowner knew of the danger and regardless of whether the accident was unavoidable.

The basis for the liability under the warranty is not due diligence, as the court below indicated, but rather a liability without fault where an injury is caused by some unsafe or unsuitable appliance or condition of the vessel. This Court had occasion to point up that very aspect of the warranty in *Seas Shipping Company v. Sieracki*, 328 U. S. 85, 90 L. Ed. 1099. There a shackle which secured the 10-ton boom suddenly broke while hoisting a heavy load, causing the boom to fall and strike one of the men working below. The evidence disclosed that the shackle broke because of an internal defect which was not visible on the surface of the shackle and which could not have been discovered by any reasonable inspection on the part of the shipowner. This Court held the shipowner responsible on the ground that the liability under the warranty was a specie of liability without fault which is not limited by conceptions of negligence. Said the Court at page 94:

> "These and other considerations arising from the hazards which maritime service places upon men who perform it, rather than any consensual basis of responsibility, have been the paramount influences dictating the shipowner's liability for unseaworthiness as well as its absolute character. *It is essentially a species of liability without fault*, analogous to other well known instances in our law. Derived from and shaped to meet the hazards which performing the service imposes, *the liability is neither limited by conceptions of negligence nor contractual in character.* Mahnich v. Southern S. S. Co., 321 U. S. 96, 88 L. Ed. 561, 64 S. Ct. 455, supra; Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 58 L. Ed. 1208, 34 S. Ct. 733, 51 LRA (NS) 1157; Carlisle Packing Co. v. Sandanger, 259 U. S. 255, 66 L. Ed. 927, 42 S. Ct. 475, supra. *It is a form of absolute duty owing to all within the range of its humanitarian policy.*" (Emphasis supplied.)

The decision of the court below cannot be reconciled with the foregoing principle of law and with the decisions of this Court. It would appear that the majority of the court below labor under an erroneous understanding of the warranty of seaworthiness. That misunderstanding has been manifested in several cases decided by the Court of Appeals below starting with the case of *Cookingham v. U. S.*, 184 F. 2d 213 (CA 3). In that case a seaman was injured when he slipped on a foreign substance on a stairway on the vessel. The court below, in a divided decision, characterized the condition as a "transitory" one and held that there was no unseaworthiness or negligence because it had not been shown that the shipowner knew of the condition and had an opportunity to repair it. That decision and the several cases which followed it by the Court of Appeals for the Third Circuit were criticised and refuted by the Ninth Circuit Court of Appeals in *Pacific Far East Lines v. Williams*, 234 F. 2d 378, and by the Court of Appeals for the Second Circuit in *Poignant v. U. S.*, 225 F. 2d 595. The late Circuit Judge Frank in a concurring opinion in the latter case reviewed the decisions and the reasoning of the Third Circuit Court of Appeals with this comment (p. 603):

> "The Third Circuit has since interpreted its Cookingham 'transitory' doctrine to mean that the ship's liability for a 'transitory' object depends upon the length of time during which the object was not removed. See Crawford v. Pope & Talbot, Inc., 3 Cir., 206 F. 2d 784, 789-790. I understand that my colleagues repudiate that thesis. The Third Circuit, in a still later case, explaining the Cookingham doctrine, has said that it turns on a distinction between (a) the duty to provide a seaworthy ship, which is absolute, and (b) the duty to provide a safe place to work, which, so that court holds, demands reasonable care only. See Brabazon v. Belships Co., 3 Cir., 202 F. 2d 904, 906. *I think that distinction directly at odds with the Supreme Court's de-*

*cisions.* I read my colleagues' opinion as repudiating it also." (Emphasis supplied.)

The correct rule, as the Supreme Court has announced it, completely divorces the warranty of seaworthiness from any requirements relating to negligence. As Mr. Justice Rutledge expressed it in the *Sieracki* case (328 U. S. 85, 94), it is essentially a species of liability without fault and liability is not limited by conceptions of negligence. Moreover, as Mr. Chief Justice Stone pointed out in the *Mahnich* case (321 U. S. 96), the warranty follows the seaman and applies "when and where the work is to be done." The requirement under the warranty to provide a safe and seaworthy vessel and appliances includes the duty to provide a "safe place to work."

In the instant case, the majority of the court below refused to find the vessel unseaworthy on the ground that the area where the vessel was navigating was not "considered a danger area so that it would not be negligent for a ship to carry open flame lanterns at a height three feet above the water." It is clear from the very phraseology employed in that finding that the Court was erroneously confusing the criteria for negligence with the warranty of seaworthiness. If the warranty be applied to the facts in this case, as required by the decisions in the *Mahnich* and *Sieracki* cases, then as Chief Judge Biggs said in his dissenting opinion, "I do not see how a plainer demonstration of unseaworthy appliances could be made." (R. 427) The naked flame kerosene lanterns did *in fact* constitute an unsafe appliance and rendered the place of work unsafe. It is irrelevant that the area was not "considered" dangerous.[3] The point is that it was *in fact* dangerous and unsafe,

3. Although the Trial Judge found that there was no negligence because the area was not considered a dangerous one, the following testimony of respondent's witness, Captain Taylor, demonstrates that at least he was aware of the danger involved in the voyage. Considering that there were seven tankers loading and discharging liquid petroleum at the spillways which his tug was approaching immediately

and for this reason the warranty is clearly applicable. The decision of the majority of the court below should be reversed upon this consideration alone.

## II.

### The Violation of the Regulation Requiring the Lights to Be Eight Feet Above the Water Was Negligence Per Se and Was Also a Breach of the Warranty of Seaworthiness.

The trial court below found that respondent had violated the Coast Guard Regulation (Title 33, Chap. I, Subchap. D, part 80.16) and that this violation was the proximate cause of the fire. However, that court held further that negligence could not be imputed to the shipowner because the purpose of the regulation was only to prevent collisions. For the same reason the Court below held the violation of the regulation did not render the vessel unseaworthy. Said the Court: "Whether the violation of the regulation be called negligence or be said to make the flotilla unseaworthy is really a question of words." The lower court's conclusion on this point conflicts with the principle announced by this Court in *Davis v. Wolfe*, 263 U. S. 239, 68 L. Ed. 284, and *Coray v. Southern Pacific Co.*, 335 U. S.

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prior to the fire. Captain Taylor gave this testimony (R. 119): "Q. Are you familiar at all with the properties of petroleum products, Captain? A. To a certain extent I am. I don't know too much about it. Q. Do you know that discharging and loading of gasoline and petroleum products gives off fumes? A. Yes, I know that much. Q. And you know you get those fumes when you go past refineries on the river? A. Sometimes you do. Q. You know that those fumes are heavier than air and they lay on the river? A. Yes. Q. And the closer to the water they are the more concentrated they are and more subject to inflammation, isn't that correct? A. Yes, sir. Q. Did you know all of these things when you were taking that voyage in November of 1952? A. Yes, I did." It would follow from this that the decision of the court below should have been reversed, even upon considerations of negligence since, knowing these things as he did, Captain Taylor, nevertheless, navigated his vessel in the refinery area with two naked lights only 2½ to 3 feet above the water.

520, 93 L. Ed. 508. Prior to the decision of this Court in the *Davis* case there was some confusion in the cases as to whether liability for personal injury could be imposed upon a carrier for the violation of a regulation where the injury sustained was not contemplated within the original protection of the regulation. In *St. Louis & S. F. R. Co. v. Conarty*, 238 U. S. 243, a switch engine ran into a standing car whose coupler and drawbar had been pulled out. The engine, in the absence of these appliances, came into immediate contact with the end of the car, and a switchman riding on the footboard of the engine was caught between it and the body of the car. And in *Lang v. New York C. R. Co.*, 255 U. S. 455, through the failure to stop in time, a string of cars that had been kicked in on a siding, ran into a standing car whose coupler attachment and buffers were gone, and the brakeman on the end of the string of cars was caught between the car on which he was riding and the standing car. In both of these cases it was held that the collision was not proximately caused by the absence of automatic couplers on the standing cars; therefore, the carriers were not liable for the injuries received by the employee, even if the collision would not have resulted in injury to them had the couplers been on the standing cars.

On the other hand in *Louisville & N. R. Co. v. Layton*, 243 U. S. 617, the failure of couplers to work automatically in a switching operation resulted in a switching operation causing a collision of cars from one of which a brakeman was thrown while preparing to release brakes, and in *Minneapolis & St. L. R. Co. v. Gotschall*, 244 U. S. 66, a brakeman was thrown from the train as a result of defective couplers coming open while the train was in motion. In these cases the defect in the couplers being in each the proximate cause of the injury, it was held that the employees were entitled to recover.

In the *Layton* case, the Court specifically distinguished the *Conarty* case on the ground that in the latter case the collision resulting in the injury was not proximately attrib-

utable to a violation of the Act.

All four of these cases were carefully examined by the Supreme Court in the case of *Davis v. Wolfe*, 263 U. S. 239, 68 L. Ed. 284, and from that analysis the Court laid down this rule (p. 243):

> "The rule clearly deducible from these four cases is that, on the one hand, an employee cannot recover under the Safety Appliance Act if the failure to comply with its requirements is not a proximate cause of the accident which results in his injury, but merely creates an incidental condition or situation in which the accident, *otherwise caused*, results in such injury; and, on the other hand, he can recover if the failure to comply with the requirements of the act is a proximate cause of the accident, resulting in injury to him while in the discharge of his duty, *although not engaged in an operation in which the safety appliances are specifically designed to furnish him protection.*" (Emphasis supplied.)

This Court reaffirmed that doctrine in *Coray v. Southern Pacific Co.*, 335 U. S. 520. In that case a decedent's death occurred when a one-man flattop motor-drive track car crashed into the back end of an 82-car freight train on a main line track. Both the train and the motor car were being operated in an easterly direction on railroad business. The train unexpectedly stopped just before the crash because the air in its brake lines escaped, thereby locking the brakes. The air escaped because of a violation of the Federal Safety Appliance Act in that the threads on the valve were so badly worn that a nut became disconnected. When the brakes locked, the motorcar was several hundred feet behind the freight train moving at about the same rate of speed as the train. The trial court directed a verdict in the railroad's favor despite the proof that the train had stopped because of the railroad's violation of the Federal Safety Appliance Act on the ground that the Act did not

apply for the decedent's protection; that the Act's protection against defective brakes did not extend to employees following and crashing into a train which stopped suddenly because of defective brake appliances. That decision was affirmed by the State Supreme Court of Utah. That court said that the object of the Safety Appliance Act insofar as the brakes were concerned is not to protect employees from standing, but from moving trains. This Court reversed, and, consistently with the doctrine previously announced, held (p. 523):

> "Liability of a railroad under the Safety Appliance Act for injuries inflicted as a result of the Act's violation *follows from the unlawful use of prohibited defective equipment, 'not from the position the employee may be in or the work in which he may be doing at the moment when he is injured'.*" (Emphasis supplied.)

In the instant case, the trial judge expressly found that the respondent violated the regulation by carrying the naked flame lower than the required eight feet above the water. He further found that this violation was the proximate cause of the fire. However, he then erroneously went on to state: "True, the origin of the fire can be traced to the violation of the regulation, but the question is not causation but whether the violation of the regulation, of itself, imposes liability." The Trial Judge accordingly held that the violation of the regulation did not create liability because the regulation was designed to prevent collisions. That holding of the court below is in clear conflict with the rule laid down by this Court in the *Davis* and *Coray* cases. *Proximate cause* is the deciding factor and not the purpose of the regulation.

The violation of the regulation was the direct proximate cause of the disaster and the Court below so found. Upon this ground alone the decision of the Court below should be reversed.

## CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed and the cause remanded solely for a determination of the question of damages.

Respectfully submitted,

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